

CASE NO. No. 16-1099

[Consolidated with No. 16-1136]

**UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT**

HAYNES BUILDING SERVICES, LLC

Petitioner/Cross-Respondent

vs.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**ON PETITION FOR REVIEW AND
CROSS-APPLICATION FOR ENFORCEMENT
OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD
NLRB CASE No. 31-CA-093920**

MOTION TO STAY APPEAL

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I. INTRODUCTION

Petitioner Haynes Building Services respectfully moves this Court to stay this appeal pending the United States Supreme Court's decision regarding one of the primary issues presented in the appeal. Specifically, one of the two main issues involved in this case is the enforceability of Haynes' arbitration agreement, in particular the class action waiver in that agreement. In its decision below, the National Labor Relations Board (NLRB or the Board) held that Haynes' arbitration agreement is unenforceable on the ground that the class action waiver violates Sections 7 and 9 of the National Labor Relations Act (NLRA), which guarantees that employees may pursue concerted action to advance their collective bargaining rights.¹ This is an issue on which the Circuit courts are split. While the Fifth Circuit in *Murphy Oil USA, Inc. v. N.L.R.B.*, 808 F.3d 1013, 1018 (5th Cir. 2015) held that such agreements do not violate the NLRA, last year the Seventh and Ninth Circuits reached the opposite conclusion in *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016) and *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), respectively.

¹ NLRB Board Member Philip A. Miscimarra dissented from the majority opinion below with respect to the enforceability under the NLRA of the arbitration agreement and the class action waiver. On January 26, 2017, the President named Member Miscimarra Acting Chairman of the National Labor Relations Board.

On January 13, 2017, however, the Supreme Court granted petitions for writs of certiorari in all three cases. The NLRB filed a notice with this Court on January 18, 2017 informing the Court of this development.

Because the Supreme Court's decision will resolve the class action waiver issue presented in this appeal, Haynes believes it would serve the interests of judicial economy and precedential uniformity to stay this appeal until the Supreme Court decides the issue. The Board has indicated that it does not oppose this motion for a stay.

II. ARGUMENT

Rule 27 of the Federal Rules of Appellate Procedure as well as the corresponding Circuit Rule permit parties to file motions in the Court of Appeals for "an order or other relief" Haynes requests that this appeal be stayed pending the Supreme Court's decision of the class action waiver issue in *Murphy Oil*, *Epic Systems* and *Morris*.

A stay would have two principle advantages. It would serve the interests of judicial economy because a decision by the Supreme Court will likely dispose of the need for this Court to expend the time and resources necessary to resolve the issue regarding the enforceability of the arbitration agreement/class action waiver involved in this case. In addition, a stay would advance the goal of uniformity in the case law, as it would avoid the potential of an inconsistency or conflict between

a decision rendered by this Court and one rendered by the Supreme Court on the same legal question. Thus, a stay is appropriate for that reason as well.

III. CONCLUSION

In whatever manner the Supreme Court decides the enforceability of the class action waiver and resolves the circuit split, its decision will provide clarity and for all practical purposes likely dispose of one of the two main legal issues in this appeal. For the foregoing reasons, Haynes requests a stay of this appeal.

DATED: January 30, 2017

BALLARD, ROSENBERG,
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By: 

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PROOF OF SERVICE

I am employed in the county of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436. On January 30, 2017, I served the following document by the method indicated below:

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☒ BY MAIL: I am “readily familiar” with Ballard Rosenberg Golper & Savitt’s practice for collecting and processing correspondence for mailing with the United States Postal Service. Under that practice, it would be deposited with the United States Postal Service that same day in the ordinary course of business. Such envelop(s) were placed for collection and mailing with postage thereon fully prepaid at Encino, California, on the same day following ordinary business practices.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 30, 2017 at Encino, California



Jeanette Tucci Kerr